Agency Counsel Newsletter

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A NOTE FROM THE ATTORNEY GENERAL

To All Agency Counsel:

This issue of the Agency Counsel Newsletter will inform you of recent developments in case law affecting your practice, lessons learned by my office that may help your agency in responding to future litigation, and recent activities undertaken by my office in areas I have designated "priority" areas. Several items in particular highlight the ways in which agency counsel can work together with my office to achieve common goals.

The update on responding to deposition subpoenas of agency officials discusses ways in which agency counsel can limit the scope of such depositions, thereby reducing the burden on agency officials. The report on bid rigging in state contracts provides information concerning collusive bidding practices and outlines procedures that public purchasing officials can use to detect such practices and to help alert our office of any suspected bid rigging. Another item of particular interest is the report on a recent major settlement achieved by the Consumer Protection/Antitrust Division of my office in an airline price-fixing case, resulting in air fare discounts for official government travel by all state and local governmental entities.

One of the principles that has guided me during the past four years, and which will continue to guide me as I begin my second term as Attorney General, is my belief that government can, and should, help to achieve fairness and equity. The laws that my office and other law enforcement agencies are charged with enforcing are one tool that can effectively be used to combat the serious problems facing our community, such as urban violence and drug use. I believe that if we are serious about solving those problems, however, we must do more. In order to achieve progress on these problems, we need long-range solutions that attempt to address the true causes of violence. Two programs in which my office has played an instrumental role -- SCORE (a student conflict and mediation program in urban schools throughout the Commonwealth) and the Safe Neighborhood

Initiative -- are examples of ways that we can work toward the goal of breaking the cycle of urban violence.

SCORE (Student Conflict Resolution Experts) is a program that provides grants for the development of school mediation programs using trained student mediators to resolve violent and potentially violent conflict among students in urban schools. The Office of the Attorney General created two pilot SCORE programs in 1989; today, SCORE provides funding for 26 mediation programs in high schools and middle schools in 15 communities in the Commonwealth: Boston, Springfield, Worcester, Somerville, Lowell, Medford, Haverhill, Malden, Taunton, Dartmouth, Fall River, Lynn, Fitchburg, Pittsfield, and New Bedford.

The model for the SCORE program is unique. My office provides grants to community mediation programs and requires that matching funds be raised. The funds are used to hire a SCORE Coordinator who develops and implements the mediation program in a targeted school. Experienced trainers from my office and from community mediation programs provide mediation training for students and teachers. To date, over 1,000 students, representing a cross-section of the student body, have been trained as mediators. The training enables students to learn the value of listening, using neutral language, not taking sides, and looking beneath the surface for the real causes of conflict. Typical mediations address fights, threats, and harassment among students.

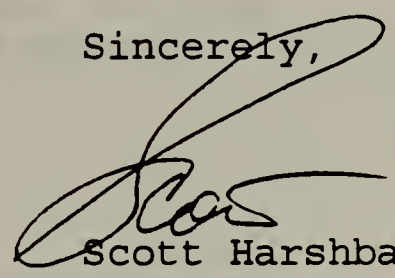
The SCORE program has been very successful. As of March, 1995, over 4,000 disputes were mediated by SCORE mediators, of which 97% resulted in agreement; less than 5% of the agreements were broken. These figures are particularly impressive in light of the fact that the majority of the disputes involved violence or serious threats of violence, and many disputes concerned sensitive racial issues in which numerous students were involved. I am especially pleased that, in implementing the SCORE program, my office has collaborated with the Department of Education and Massachusetts Association of Mediation Programs to provide training for school mediation programs. The office similarly has teamed up with the Department of Eduation and Massachusetts Association of Mediation Programs to provide mediation training for Crisis Intervention Teams ("CIT"), which provide short-term emergency mediation services to schools facing crises; following such intervention by CIT, whenever possible my office follows up with funding for a SCORE program to resolve conflicts over the long-term.

The Safe Neighborhood Initiative ("SNI"), which was described in the August 1994 issue of the Agency Counsel Newsletter, is also aimed at reducing urban violence. Through that program, my office, together with community residents and other law enforcement agencies, is working to revitalize urban neighborhoods in Boston by reducing crime and providing services to community residents.

SCORE and SNI are two examples of programs in which government and community can work together to try to solve the difficult problems we face. These programs reflect my belief that, in order to address problems such as urban violence, the law provides a necessary starting point; but we must go beyond the law to look for long-term solutions that reflect a sense of our values and priorities.

In providing legal representation to agencies in the Commonwealth, I am similarly guided by my belief that law is a minimum standard, and that community and government officials must strive to operate in a manner that reflects our broader values as well. Government should provide fair procedures to citizens, even if, in a particular situation, the law requires something less. I believe that agencies thus are best-served by an approach that seeks not merely to avoid losing individual cases in the short-term, but that ensures a broader fairness in the long-term, consistent with the mandates of each agency. My goal for my staff, in providing advice and legal representation to agencies, is to keep in mind these broader concepts.

Sincerely,



Scott Harshbarger

A SPECIAL NOTE TO NEW AGENCY COUNSEL

New agency general counsel are invited to contact Sherrie Costa (727-2200, ext. 2071) to set up a meeting with Judith Yogman, Chief of the Administrative Law Division, and Douglas Wilkins, Chief of the Trial Division, to discuss pending and anticipated litigation affecting your agency and other litigation-related issues of mutual interest and concern.

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SOME RECENT CASES

States of Colorado, et al. v. Airline Tariff Publishing Company, et al.
(U.S. District Court, District of Columbia, September, 1994)

In September, 1994, ten states, including Massachusetts, settled a price-fixing case against all of the major airlines in the United States (American, Alaska, Continental, Delta, Northwest, TWA, United, and USAir Airlines). Under the terms of the settlement, all state and local governments nationwide will receive a combined total of up to $40 million in air fare discounts. The court preliminarily approved the settlement in December, 1994, and granted final approval of the settlement on May 10, 1995. The terms of the settlement, and the manner in which state agencies and municipalities in Massachusetts can take advantage of the air fare discount, are described below.

Under the terms of the settlement, each governmental traveler will receive a ten percent discount for any official business on future flights on Alaska, American, Continental, Delta, Northwest, TWA, United and USAir. The discount is valid for 18 months or until the limit of $40 million among all airlines listed above is reached. The discount will become available beginning in August, 1995, following entry of judgment. The discount will apply to every class of ticket (business, coach, reduced and supersaver fares) and will also apply to any contract fare in excess of $50. The discounts are not subject to special restrictions or "black-out" periods.

The discount is available to all "eligible governmental entities," defined as each state of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas Islands, and each of their political subdivisions or instrumentalities, including their departments, branches, bureaus, agencies, colleges, universities, hospitals, counties, cities, towns, villages, parishes, municipalities, school districts, public transit districts, special purpose districts, redevelopment agencies and taxing districts.

The discount is available for "official government travel" only, i.e., travel that is conducted for business purposes of the eligible governmental entity and the costs of which are either paid for or reimbursed by the governmental entity.

The discount will apply to fares for domestic travel on a single airline or its majority-owned subsidiaries, or for a connecting itinerary consisting entirely of travel on one

airline and a commuter carrier. Domestic travel includes all travel within the United States, the District of Columbia, Puerto Rico or the U.S. Virgin Islands.

The discount fare may not be used in conjunction with any coupons, bonuses or award certificates and may not be used toward the purchase of tickets that involve inter-airline travel. However, the discount will be available in addition to any discounts or reduced or special fares that are a component of any existing or future contract fare between an airline and a governmental entity.

In order to receive a discount, the governmental entity employee must present appropriate evidence of eligibility (i.e., that he or she is an eligible purchaser and that the travel is for official government purposes). The following documents constitute appropriate verification that travel is being conducted for purposes of official business on behalf of an eligible governmental entity: purchase of a discount fare ticket with an authorized eligible governmental entity charge card; an authorizing letter, on eligible governmental entity letterhead, stating that the traveler is conducting official governmental business, and setting forth the traveler's name, dates of travel, and basic itinerary together with an authorizing signature; an executed eligible governmental entity travel request form and payment or executed travel authorization form with official eligible governmental entity approvals; or an eligible governmental entity purchase order for domestic air passenger transportation services.

Each airline will provide its employees and travel agents notice of the above requirements in order to limit fraudulent purchases of tickets with the discount. Any unauthorized or non-eligible traveler using these discounts will be subject to criminal prosecution.

All class members (each governmental entity in each state) will receive notice of the settlement with an option to opt out of the settlement, and will be notified that the discount fare will become available on or about August 10, 1995.

The Office of the Attorney General has provided the administrator of this settlement with addresses of each municipality, state agency, state university, state hospital, school district, county and other semi-governmental agencies in Massachusetts. (Contact: AAG Pasqua Scibelli, Consumer Protection/Antitrust Division, for information about the settlement, or to obtain a copy of the list of public entities affected.)

Johnson v. Commissioner of the Department of Public Welfare, 419 Mass. 185 (1995)

In the recent case of Johnson v. Commissioner of the Department of Public Welfare, 419 Mass. 185 (1995), the Supreme Judicial Court reaffirmed that attorney's fees are available under 42 U.S.C. § 1988 in routine appeals from agency decisions under chapter 30A as long as the complaint contains a substantial federal law claim. The Court rejected our arguments (1) that plaintiff's federal claim--that the termination of her AFDC benefits violated federal regulations--was not actionable under 42 U.S.C. § 1983; and (2) that no fees should be awarded under section 1988 where, as here, plaintiff's federal claim was entirely congruent with and therefore superfluous to her chapter 30A claim. In so doing, the Court expressly reaffirmed its 13-year-old holding in Stratos v. Department of Public Welfare, 387 Mass. 312 (1982). In light of the decision in Johnson, it is now painfully clear that plaintiffs who prevail in chapter 30A cases in which their complaints raise any "substantial" federal law claims are entitled to attorney's fees under 42 U.S.C. § 1988. Therefore, ordinarily there is no point in litigating the entitlement to fees unless the amount sought is clearly excessive. Even then, every effort should be made to negotiate a settlement of fee claims, since litigating the amount of fees only generates further fee claims for the time spent on the fee litigation. (Contact: AAG Judith Yogman, Chief of the Administrative Law Division)

LESSONS WE'VE LEARNED

Update: Responding to Subpoenas Where the Agency or Official Is Not a Party

The April 1993 issue of the Agency Counsel Newsletter (Issue No. 2) provided a brief overview of the substantive grounds for opposing notices or subpoenas requiring agency employees to testify at depositions in cases where the agency or official is not a party. In general, such depositions are opposed on the ground that the information sought is not relevant, especially as to the mental processes and motives of decisionmakers, or on the ground that requiring agency officials to testify is burdensome to the performance of official duties and to the decisionmaking process itself by inhibiting frank intra-governmental discussions. Some recent

cases have raised additional concerns and highlighted the ways in which the Office of the Attorney General and agency counsel can assist each other in responding to subpoenas.

A spate of deposition and trial subpoenas served on agency officials or employees has revealed a new trend in private litigation--depositions or examinations of agency personnel that go beyond personal knowledge of events relevant to the lawsuit and seek to use the officials or employees as expert witnesses. In one case, for example, a state investigator who filed a report of an accident scene was asked questions at his deposition about his agency's practices, procedures, and policies. In another instance, a state employee testifying at trial about a statement he made to one of the parties was questioned about his agency's regulations in general. The issue commonly arises in subpoenas of Department of Environmental Protection officials in private party litigation over contaminated property. If a Department employee has investigated and collected data at the site, the parties will often seek not only to use the data collected but also to use the Department employee to opine on what the data reveals about the location as well as the extent and source of the contamination. While agency employees may be subpoenaed concerning their direct and personal knowledge of legally relevant information, the Office of the Attorney General has successfully moved to quash or limit subpoenas seeking expert testimony from such employees on the ground that a party cannot compel a witness to give his or her expert opinion on a particular matter.

Our experiences in these cases have revealed some ways in which agency counsel may aid, or even obviate the need for, the involvement of the Attorney General's Office in responding to subpoenas of agency employees. Because the agency or official is not a party to the litigation in these circumstances, the Office of the Attorney General may not have had any involvement with the case prior to service of the subpoenas, and agency counsel thus may frequently be in as good a position to negotiate with opposing counsel as is our office. Such negotiations should include, at a minimum, an agreement limiting the deposition or trial testimony of the official to his or her personal and direct knowledge of relevant events, with written confirmation of opposing counsel's agreement not to seek expert testimony from the official. Of course, agency counsel should first attempt to obtain a copy of the complaint and any other subsequent pleadings necessary to determine whether the information sought is even relevant. It is often advisable to contact other counsel in the matter, as they may provide helpful information or even be willing to take the lead

in opposing the subpoenas. Should these efforts to negotiate a solution fail, agency counsel should contact the Office of the Attorney General to discuss a motion to quash or limit testimony.

A guide to opposing subpoenas of agency officials, both in circumstances where the agency or official is a party and cases where the agency or official is not a party, is available from the Administrative Law Division. The guide has been updated to include samples of motions and memoranda filed in opposition to subpoenas seeking to use agency employees as expert witnesses. To obtain copies of the guide, please contact Sherrie Costa in the Administrative Law Division. If your agency or an official or employee of your agency receives a subpoena, and you are unable to resolve the matter, contact Judith Yogman, Chief of the Administrative Law Division, for further assistance or to arrange for representation. Early notice of such matters is helpful, to permit sufficient time for the filing of a motion in appropriate cases. (Contact: AAG Judith Yogman, Chief of the Administrative Law Division)

Agency Notices Must Provide Recipient of Benefits with Adequate Basis to Contest Agency Action

A recent case in federal court sheds light on a problem that agencies may encounter in sending notices to the public and to the people they serve. In Febus v. Department of Public Welfare, the plaintiff is a Massachusetts welfare recipient whose foodstamp benefits were terminated because her name appeared in a computer match program indicating that she was receiving welfare benefits in another state. The Department of Public Welfare (now the Department of Transitional Assistance) recently implemented a computer match program, using records from welfare departments in Massachusetts and other states, as a way of eliminating fraudulent "double dipping" by welfare recipients (i.e., simultaneous receipt of benefits in Massachusetts and another state). The plaintiff filed a class action suit challenging the notice and verification procedures used by the Department to terminate benefits to recipients whose names were identified by the computer match as receiving benefits from another state.

Plaintiff sought a preliminary injunction against the Department's termination of benefits based on the notices sent to recipients identified by the computer match program. The plaintiff submitted affidavits from approximately 10 persons who had been sent termination notices by the Department based on the computer match, all of which notices allegedly were sent

in error. The Department rectified the situation in each of the cases, before the cases even got to the hearing stage, and no recipient actually lost benefits as a result of the computer match.

The notice at issue (which has since been changed by the Department) stated that benefits would be terminated because "You and/or a household member are living outside of Massachusetts and do not plan to return soon." The Department took the position that use of this notice was appropriate because it was reasonable to infer that a person receiving welfare benefits from another state had moved out of Massachusetts.

The plaintiff claimed that the notice was misleading because it did not set forth the real reason for termination of welfare benefits (receipt of benefits simultaneously in more than one state) and because the notice would lead a recipient mistakenly to believe that that he or she need only show proof of Massachusetts residency in order to avoid termination of benefits. The plaintiff submitted affidavits alleging that only upon appearing at the Department's hearing were recipients informed that proof of non-receipt of benefits from another state was required in order to avoid termination of benefits in Massachusetts.

The court found that the notice of termination based on the computer match was misleading, enjoined the Department from terminating benefits of any recipients who had received the defective notice, and ordered the Department to reinstate benefits to the households for which the Department had terminated benefits based on the notice.

The key lesson to be learned is that notices of termination of benefits or other agency action must, at a minimum, provide the recipient with an adequate basis to contest the agency action. This is so even if the agency provides a subsequent procedure, such as a pre-termination hearing, to protect against erroneous termination of benefits. Here, despite the fact that the Department provided formal and informal procedures designed to prevent errors, the court held that the notices created too great a risk of erroneous deprivation of benefits. The court noted that many recipients who had received the notice in question appeared at the hearing prepared to present proof of their Massachusetts residency, rather than proof that they were not receiving benefits from another state. Since recipients claimed to have difficulty obtaining verification documenting their non-receipt of

benefits from another state, the court found that the notice as sent created too great a risk of erroneous deprivation.

The Administrative Law Division will review notice forms generally used by agencies, or notices to be used in a particular situation, in order to identify potential legal issues and minimize litigation exposure that can delay or halt agency action. Please contact AAG Judith Yogman, Chief of the Admnistrative Law Division, if you would like our office to review your agency's notice. (Contact: AAGs Douglas Brown and James Whitcomb, Western Massachusetts Office)

THE ATTORNEY GENERAL'S PRIORITIES

Bid Rigging in State Contracts

Bid rigging and price fixing have a negative effect on the American public as damaging as any other economic crime. Such illegal activity contributes to the high prices paid by consumers for goods and services, weakens public confidence in the bidding process, and undermines our system of free enterprise.

As purchasers of goods and services, public purchasing officials can be both prime targets for, and front line detectors of, collusive behavior in the bidding process. Procurement officers who detect an antitrust violation and aid state or federal enforcement officials in investigating and prosecuting the responsible parties can end a practice that costs the Commonwealth money.

Generally, both state and federal antitrust laws prohibit price fixing among horizontal competitors, i.e., competitors at the same level of the distribution chain. Bid rigging is one type of horizontal price fixing scheme and can take a number of forms.

Bid suppression or bid limiting. In this type of price fixing scheme, one or more competitors agree with at least one other competitor to refrain from bidding on a certain contract, or agree to withdraw a submitted bid to ensure that a competitor's bid will be accepted. Other forms of this activity involve agreements by competitors to fabricate bid protests or to coerce suppliers and subcontractors not to deal with non-conspirators who submit bids.

Complementary bidding. A second form of bid rigging is known as complementary bidding (also referred to as shadow bidding). Complementary bidding occurs when competitors submit token bids that are too high to be accepted (or if competitive in price, on other terms that will ensure that the bid is not accepted). These token bids are designed to give the appearance of fair and non-collusive bidding. This type of scheme is generally used when a contracting agency requires a minimum number of bidders for a contract.

Bid rotation. Bid rotation is a third type of bid rigging conspiracy. In bid rotation conspiracies, the participating vendors take turns being the lowest bidder. In its most basic form, bid rotation consists of a sequential pattern for submitting the winning bid on a contract.

Market division. Market division schemes are agreements between competitors to refrain from competitively bidding in a specifically designated portion of the market. Colluding bidders may allocate certain contracts or types of contracts so that other competitors will not bid or will supply complementary bids on contracts put out to bid by a certain class of customer.

For example, contractors A, B, and C decide that A will supply all the schools in the state, B will supply all the jails and C will handle the state government contracts. In a government contract, A and B will not bid, or will submit complementary bids in order to ensure that C wins the contract. The same pattern is used for school and jail contracts, with A and B winning their allotted segment of the market.

Allocation of territories among competitors is also illegal. This type of behavior is comparable to an allocation of customers scheme, but involves a division of contracts based on geographic location rather than on type of contract.

Procedures that can be established to discourage anticompetitive activity include the following:

1. Expanding the list of bidders to make it more difficult for bidders to collude. Public purchasing officials should solicit as many reliable bidders as economically possible to decrease the possibility that conspirators will be able to coordinate illegal activities.

2. Ensuring that the agency understands the elements of bid rigging, by providing this information to persons in the agency or department who have day-to-day contact with bidders.

3. Having procurement records readily available. Reviewing bids on a single contract is not enough to prevent bid rigging since past bids are necessary to determine if there is a pattern of bid rotation or allocation in existence.

4. Reporting suspected collusive behavior (based on bid analysis, an audit, a complaint from other competitors, or statements by employees of a bidder) to the Consumer Protection/Antitrust Division of the Office of the Attorney General or the United States Department of Justice.

It is important to ensure that bids for agency contracts are as competitive as realistically possible. Vigilance and strict application of ethical principles by agency procurement officials are the only safeguards that stand in the way of unscrupulous contractors. Thus, it is important for all agency procurement officials who are involved in the bidding process, either directly or in a supervisory capacity, to become familiar with the characteristics of bid rigging and to report any suspicious behavior that raises possible enforcement concerns. Agency procurement officials who are interested in training sessions on procedures to avoid bid rigging should contact AAG George K. Weber, Chief of the Consumer Protection/Antitrust Division. (Contact: AAG George K. Weber, Chief, Consumer Protection/Antitrust Division, or Ralph T. Giordano, Chief, New York Office, Antitrust Division, U.S. Department of Justice, (212) 264-0390)

Victim Compensation System Is Converted to Administrative Agency Within Office of the Attorney General

The Massachusetts Victims of Violent Crime Compensation Act became effective on April 14, 1994. Passage of the Act marked the culmination of years of effort by the Office of the Attorney General, and in particular by the Family and Community Crimes Bureau and the Victim Compensation and Assistance Division. This new law significantly reforms the process by which victims of violent crime receive financial compensation for medical, funeral and mental health counseling expenses, as well as for lost wages and loss of financial support.

The Act converts the Massachusetts victim compensation system from a court-based process to an administrative process. Under prior law, in order to obtain compensation,

victims were required to go through a cumbersome, lengthy and often adversarial court process. As a result, cases took two to three years to resolve. The backlog of cases proved daunting for victims and extremely frustrating for the staff of the Victim Compensation and Assistance Division, who are committed to assisting victims of violent crimes.

Under the new Act, claims for compensation are filed, investigated and approved for payment in the Victim Compensation and Assistance Division of the Office of the Attorney General. This administrative process allows the Division to resolve claims for compensation through a more streamlined and efficient process, thus dramatically improving the quality of service the Office of the Attorney General provides to victims of violent crimes and their families.

As an administrative agency within the Office of the Attorney General, the Victim Compensation and Assistance Division is able to obtain legal advice and assistance in developing internal policies, promulgating regulations, and developing legal positions and strategies for potential challenges to the statute. With the benefit of such advice and assistance, the Division has worked with the Office of the Chief Administrative Justice in determining which claims will remain pending in the courts under the old system, and which claims will be determined in accordance with the new administrative system.

The Act brings Massachusetts in line with the vast majority of other states, which process victim compensation claims under administrative-based systems. Under the Act, a victim is still provided certain rights of review and appeal if his or her claim is denied in whole or in part by the Division. First, a victim has a right to request administrative review of any decision made by the Program Director of the Victim Compensation and Assistance Division. In addition, a victim can file a petition in the District Court Department of the Trial Court, seeking de novo judicial review of the Program Director's decision. While hundreds of claims have already been decided under the new administrative system, to date no claimants have sought judicial review of the Program Director's decisions.

The new Victims of Violent Crime Compensation Act marks an important turning point for the victim compensation program. The Act has greatly improved the administration of victim compensation claims and enabled the Office of the Attorney General to provide greater assistance to victims of violent crimes and their families. (Contact: AAG Judith Beals, Chief

of the Victim Compensation and Assistance Division, and AAG Barbara Boden, Victim Compensation and Assistance Division)

MATTERS OF CURRENT INTEREST

Attorney General Makes New Appointments in Government Bureau

The Attorney General has appointed Assistant Attorney General Douglas Wilkins to be the new Chief of the Trial Division of the Goverment Bureau, effective April 1, 1995. Doug, who has been an Assistant Attorney General in the Government Bureau since 1984, has served as Chief of Litigation and Training. Doug succeeds Stuart Rossman, who has been appointed Chief of the newly formed Business and Labor Protection Bureau, which will include the Medicaid Fraud Control Division and the Fair Labor and Business Practice Division.

The Attorney General has appointed Assistant Attorney General Peter Sacks to be Deputy Chief of the Government Bureau. Peter has served as an Assistant Attorney General in the Administrative Law Division, and has been an Assistant Attorney General since 1988. His new responsibilities will include assisting Government Bureau Chief Judy Fabricant in administrative matters and directing litigation-reduction and related projects and initiatives. In addition, Peter will continue to handle litigation on election and other administrative law matters.

John Bowman, an Assistant Attorney General in the Trial Division, has been named Training Coordinator for the Government Bureau. John has been an Assistant in the Trial Division since 1991. In his new capacity, John will coordinate the planning and presentation of in-house training programs for Assistant Attorneys General and will also coordinate training programs provided by the Office of the Attorney General to agency counsel. If you have any suggestions about such training programs, please call John Bowman at 727-2200, ext. 3311.

Change of Address for Certain Divisions of Office of Attorney General

Effective June 5, 1995, the following Bureaus and Divisions in the Office of the Attorney General are located at 200 Portland Street: Trial Division, Environmental Protection Division, Business and Labor Protection Bureau, Medicaid Fraud Control Division, Department of Employment Training, Consumer Complaint Section, and Regulated Industries Division. In addition, the Victim Compensation and Assistance Division is now located at One Ashuburton Place, 18th Floor.

Environmental Protection Division Moves to Government Bureau

The Attorney General has moved the Environmental Protection Division from the Public Protection Bureau to the Government Bureau. This move recognizes the significant overlap between the Government Bureau and the Environmental Protection Division in terms of substantive legal issues addressed in litigation, the nature of the litigation, and interactions with agencies. The reorganization will promote the sharing of resources and expertise, and the coordination of positions taken in cases, among Assistant Attorneys General in what are now the three divisions of the Government Bureau. In addition, the reogranization will make the substantive expertise of the Environmental Protection Division more readily available to other agencies in environmental matters.

Attorney General Is Developing Plan to Improve Recruitment and Retention of Minority Attorneys

The Attorney General's Office is in the process of developing a plan to improve our recruitment and retention of minority attorneys. This effort includes review of our existing hiring, training, supervision, and personnel practices, as well as development of plans for expanded recruitment and outreach efforts. If your office is undertaking similar efforts, we would be glad to exchange information with you and to discuss possible coordination. Please contact Government Bureau Chief Judy Fabricant, Jane Tewksbury, Legal Counsel to the Attorney General, or Personnel Assistant Christina Cardona.

Developments in Takings Law

When does a state law or regulation so restrict the use of private property that it amounts to a taking without just compensation? Two cases decided in 1994 by the United States Supreme Court and the Massachusetts Supreme Judicial Court may provide guidance to agencies faced with questions concerning the permissible scope of regulatory takings. Both cases interpret the Takings Clause of the Fifth Amendment of the United States Constitution (applicable to the States through the Fourteenth Amendment), which prohibits taking of private property without just compensation.

In June, 1994, the United States Supreme Court issued an important takings decision, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). In Dolan, a landowner challenged a city's requirement that the landowner deed portions of her property to the city for improvement of a storm drainage system and for a bicycle and pedestrian pathway, as conditions for a city building permit. The Supreme Court held that permit conditions that require a landowner to deed portions of property to a municipality can be justified, only if the municipality establishes a "rough proportionality" between the required dedication and the impact of the development. Id. at 2319. The Court imposed a new obligation on permitting agencies to make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Id. at 2319-20. Under the Court's holding in Dolan, agencies thus must make individualized determinations, in the case of each property owner to whom a permitting regulation applies, that the permit requirements are related to legitimate state interests and are proportionate to the impact of the proposed use.

In Lopes v. City of Peabody, 417 Mass. 299 (1994), the Supreme Judicial Court considered a challenge to the validity of a municipal zoning ordinance that established a wetlands conservancy district and prohibited building within the district at elevations less than a certain level above sea level.. Since all but a very small portion of the plaintiff's land was below the required elevation, the plaintiff claimed that the ordinance was invalid because since it deprived him of all economically beneficial use of his property. In light of the United States Supreme Court's decision in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the SJC stated in Lopes that it would not interpret the wetlands conservancy district ordinance as having been intended to deprive property owners of all beneficial use, except in circumstances where the restriction on property resulting from

the ordinance would be independently justifiable under traditional principles of nuisance and property law. 417 Mass. at 303. (In Lucas, the Supreme Court had held that a landowner was entitled to compensation for a taking when a zoning regulation effectively prohibited all economically beneficial use of the land, unless the prohibition could be independently justified under principles of South Carolina nuisance or property law. 112 S. Ct. at 2900.)

The SJC remanded Lopes to the Land Court for further proceedings. The SJC directed the Land Court to determine on remand whether the ordinance deprived the plaintiff of all economically beneficial use of his land. The SJC directed that, if the ordinance were found to deprive the plaintiff of all economically beneficial use of his property, and no justification existed for that restriction, the Land Court should enter judgment declaring the ordinance inapplicable to the plaintiff's property to the extent necessary to "permit an economically beneficial use of the land." 417 Mass. at 304. The SJC also indicated that, if under Massachusetts land use law the plaintiff's proposed use of his property would be a nuisance or otherwise impermissible, the ordinance could be upheld even if it deprived the plaintiff of all economically beneficial use. 417 Mass. at 306-307.

In March, 1995, the Land Court issued a decision finding that the ordinance would result in a taking if applied strictly to the plaintiff's property, since it deprived the plaintiff of all beneficial use and was not independently justifiable under traditional principles of nuisance and property law. To avoid a permanent regulatory taking, the Land Court limited the application of the ordinance to the plaintiff's property, effectively amending the ordinance. The result of this "amendment" was to limit the City's liability to a claim for damages for a temporary taking; at most, the City could be held liable for a temporary taking for the period of time during which the ordinance was strictly applied to the plaintiff's property. Since the plaintiff had challenged only the validity of the ordinance and had not sought damages, the Court was not required to determine whether the plaintiff (who had purchased his property before the ordinance took effect) in fact could obtain damages for a temporary taking.

In the event that Massachusetts courts take the same approach with respect to takings challenges to state reulgations, the courts will not apply state regulations in a manner that deprives a property owner of all beneficial use of his property, unless such application would be independently justifiable under traditional principles of nuisance and

property law. As in Lopes, courts could limit the application of state regulations to avoid permanent regulatory takings, thereby effectively amending the regulations.

Agencies that are concerned about such judicial "amendments" are advised to include in their regulations a provision for a variance. Such a provision could allow owners to apply for a variance on the ground that strict application of the regulations would result in a taking, thereby enabling agencies, rather than courts, to determine in the first instance the extent to which regulations should be amended to avoid permanent regulatory takings. Such a provision also would limit the Commonwealth's exposure for damages for temporary takings, since property owners could not make a claim for even a temporary taking unless and until an agency had denied his request for a variance. (Contact: AAG Madelyn Morris, Environmental Protection Division)

Supreme Judicial Court Upholds Retroactive Application of "Public Duty" Amendments to Massachusetts Tort Claims Act

An article in the August, 1994 issue of the Agency Counsel Newsletter (Issue No. 4) provided an overview of legislative amendments to the Massachusetts Tort Claims Act, G.L. c. 258, §§ 10(e)-(j), which codified the common law "public duty" exception to governmental liability. As set forth in that article, the amendments provided, in part, that their provisions would be applied retroactively to all pending claims. The earlier article also noted that the Supreme Judicial Court had several cases before it that raised the issue of the constitutionality of retroactive application of the amendments.

In two recent decisions, the Court upheld application of the new "public duty" statute to all claims "upon which a final judgment has not entered, or as to which an appeal is pending or the appeal period has not expired" at the time of the enactment. St. 1993, c. 495, § 144. Therefore, the public duty amendments should be considered to apply to all claims pending on, or filed after, January 14, 1994.

In Carleton v. Framingham, 418 Mass. 623 (1994), the Supreme Judicial Court held that the retroactive application of the new statutory public duty rule did not deny the plaintiffs due process in violation of the state or federal Constitutions. The plaintiffs claimed that a police officer negligently permitted an intoxicated driver whom the officer had stopped to continue operating his car, which subsequently

stuck another car, killing its two occupants. The Court ruled that the plaintiffs' claims were barred by G.L. c. 258, § 10(h), as amended, which immunizes towns from tort claims based on the "failure to provide adequate police protection," failure to "prevent the commission of crimes," and failure to "enforce [a] law." The decision effectively sanctions the Legislature's decision to overturn the rule of Irwin v. Ware, 392 Mass. 745 (1984).

The Supreme Judicial Court subsequently reiterated its Carleton ruling in Pallazola v. Foxborough, 418 Mass. 639 (1994). The Commonwealth filed an amicus brief in favor of the constitutionality of retroactive application of the amendments, as it had in Carleton. The Court, citing Carleton, applied the new public duty statute retroactively; plaintiffs had alleged negligent failure to provide sufficient police protection and failure to prevent injury by third parties who unlawfully removed a portion of an aluminum goal post that ultimately struck a high tension electrical wire and killed an innocent bystander. (Contact: AAG Eleanor Coe Sinnott, Trial Division)

Board of Registration Referrals to the Attorney General

The Division of Registration, which regulates and licenses activities of professionals and trades, often refers matters to the Office of the Attorney General for possible prosecution. The work of the Division typically leads to two types of referrals to the Office of the Attorney General. First, the Division may refer matters involving unlicensed professionals or tradespersons, i.e., persons who were never licensed by the Division or who continued to practice their profession or trade following suspension or revocation of their license. The practice of a profession by such unlicensed persons violates G.L. c. 112, the general licensing statute, and other statutory provisions governing licensing. In such cases, the Office of the Attorney General can seek civil injunctive relief against the professional or tradesperson, barring continued practice, or can prosecute the professional or tradesperson under criminal statutes prohibiting certain professionals or tradespersons from practicing without a license.

Second, the Division may refer matters involving professionals or tradespersons who deceive consumers, in violation of G.L. c. 93A, or who commit crimes such as larceny or making false statements, in violation of G.L. c. 266 and G.L. c. 175H. Examples of deceptive practices and criminal acts include false representations by home improvement contractors to perform work upon receipt of a deposit from a

consumer; overbilling of consumers; and submission of false statements by a health care professional to an insurance company regarding the necessity for medical treatment provided to a consumer. In such cases, the Office of the Attorney General can seek civil or criminal sanctions against the professional or tradesperson.

The Public Protection Bureau is the appropriate point for initial referral of a potential affirmative matter from the Division of Registration. The Bureau combines both civil and criminal prosecutorial powers and has experience handling cases in which consumers have been deceived or endangered. Certain cases may be referred by the Public Protection Bureau to the Government Bureau, which has extensive experience representing the Boards of Registration in appeals from, and enforcement of, the Board's administrative disciplinary order. The Public Protection Bureau may also refer appropriate cases to the Criminal Bureau. (Contact: AAG William Brownsberger, Consumer Protection/Antitrust Division)

RESOURCES AVAILABLE FROM THE ATTORNEY GENERAL

Written Materials

Below is a summary of some of the written materials that our office makes available to agency counsel, with a note on how to obtain them. Items described in the "New Materials" section immediately below are new items that have not been described in previous issues of the Agency Counsel Newsletter. Items listed in the "Additional Materials" section are items that have been described more fully in a previous issue; for more information on those items, call the contact person. All contact persons may be reached through our main telephone number, 727-2200.

New Materials

1. Government Bureau Training/Updated 10/93-4/94 -- This updated training manual provides helpful background information on procedural matters (such as filing responsive pleadings and interlocutory appeals), practice tips (including discussion of trial preparation, preliminary injunctions, and written and oral advocacy), and substantive legal issues (including civil rights, soverign immunity, Eleventh Amendment immunity, and attorneys' fees). (Contact: Sherrie Costa, Administrative Law Division)

Additional Materials

1. The Public Records Law--A User's Manual (Revised) -- A revised version of the Public Records Law Manual has now been issued. The manual summarizes applicable provisions of the Massachusetts Public Records Law, discusses how to comply with a public records request, and sets forth statutory and common law exemptions to the general rule that public records must be disclosed. Further information and copies are available by contacting Betty Lamacchia, Consumer Protection/Antitrust Division.

2. Boston Bar Association Civil Litigation Standards -- These standards provide guidance on the application of basic principles of civility to specific problems that arise in civil litigation. To obtain copies, contact Sherrie Costa, Administrative Law Division.

3. Employment Rights of Individuals With Disabilities -- This booklet summarizes provisions of state and federal employment laws governing the rights of disabled individuals in the workplace. (Contact: Karin Raye, Paralegal in the Civil Rights Division)

4. Eminent Domain and Contract Interest Statutes--Recent Amendments -- (Contact: AAG Douglas Wilkins, Chief of the Trial Division)

5. Report of the Trial Division's Settlement Task Force -- (Contact: AAG Thomas Bean, Administrative Law and Trial Divisions)

6. Guidelines for Agency Counsel-Attorney General Relations in Defensive Litigation -- (Contact: Sherrie Costa, Administrative Law Division)

7. Sexual Harassment: Policy and Training Materials -- (Contact: Geeta Prasad, Paralegal in the Civil Rights Division)

8. Title II of The Americans with Disabilities Act -- These materials, which were provided at a training session previously conducted by the Office, are available by contacting Karin Raye, Paralegal in the Civil Rights Division.

9. Chapter 30A/Administrative Law Training (Contact: Sherrie Costa, Administrative Law Division)

10. Brief Bank -- (Contact: Sherrie Costa, Administrative Law Division, or come to One Ashburton Place, Room 2019, and browse)

11. Government Bureau Form Files -- (Contact: Sherrie Costa, Administrative Law Division, or come to One Ashburton Place, Room 2019, and browse)

12. State Administrative Decisions: How to Write Them, Challenge Them or Defend Them -- (Contact: Sherrie Costa, Administrative Law Division)

13. Compendium of Government Law -- (Contact: Sherrie Costa, Administrative Law Division)

14. Protecting Agency Personnel from Depositions -- (Contact: Sherrie Costa, Administrative Law Division)

15. The Massachusetts Tort Claims Act -- (Contact: AAG Douglas Wilkins, Chief of the Trial Division)

16. Discovery Practice and Procedure -- (Contact: AAG Douglas Wilkins, Chief of the Trial Division)

17. Government Bureau Report -- (issued every two months; contact Sherrie Costa, Administrative Law Division)

18. Notes on Relations between the Attorney General and Agencies -- (Contact: Sherrie Costa, Administrative Law Division)

19. Guidelines for Formal Attorney General Opinions -- (Contact: AAG Judy Levenson, Opinions Coordinator, Administrative Law Division)

20. Open Meeting Law Guidelines -- (Contact: AAG Maurice Cunningham, Executive Bureau)

21. Soliciting Signatures on Nomination Papers and Initiative Petitions on Public Property -- (Contact: AAG Peter Sacks, Deputy Chief of the Government Bureau)

22. Civil Litigation Guidelines -- Copies of the Guidelines have already been sent to agency counsel; additional copies are available from Sherrie Costa in the Administrative Law Division.

23. Presentment Procedures -- Copies of a memorandum dated October, 1992, regarding the presentment of tort claims against state agencies under G.L. c. 258, § 4, have already been sent to agency counsel. Additional information and copies are available from AAG Bill Daggett, Managing Attorney of the Trial Division.

Training Sessions and Workshops

1. Title II of The Americans with Disabilities Act -- The Attorney General's Office previously provided a training session on Title II of the ADA, and materials from that session are available by contacting Karin Raye, Paralegal in the Civil Rights Division. If there is sufficient interest in a follow-up session on specific aspects, such as employment issues, the Office will arrange another training session. Contact AAG John Bowman, Training Coordinator, if you are interested in such a session.

2. Chapter 30A/Administrative Law Training videotape -- (Contact: Sherrie Costa, Administrative Law Division)

3. "How to Define the Public Interest -- the Attorney General's Litigation Choices" videotape -- (Contact: Sherrie Costa, Administrative Law Division)

How Can We Help?

Are there areas not mentioned in our list of resources in which our advice could be helpful? For example, could you or other agency personnel benefit from written materials and/or training sessions concerning difficult employees and employment litigation? Conducting investigations? Evaluating tort claims? Please contact AAG John Bowman, Training Coordinator in the Government Bureau, if you would like to discuss your ideas along these lines.

How Can YOU Help?

Has your agency developed training materials or other resources that you think might be useful to other agencies? If so, please contact AAG John Bowman, and we will list and describe your item(s) in future issues of this Newsletter so that other agency counsel can contact you directly.

Also, you can help us by keeping us informed of anticipated or potential litigation. Please contact Judith Fabricant, Chief of the Government Bureau, or the appropriate division chief. Our office also is available to review proposed regulations and legislation to consider the potential for litigation and the defensibility of the regulations or legislation. We also are available to review notice forms and to consider any potential litigation that may arise from such notices.

ASSISTANCE AND CONTACTS IN THE OFFICE OF THE ATTORNEY GENERAL

The main telephone number for all extensions listed below is (617) 727-2200.

Scott Harshbarger, Attorney General 2042
Thomas H. Green, First Assistant Attorney General 2057

Executive Bureau

Peter Sacks, Elections 2064
Maurice Cunningham, Open Meeting/Public Records 2045

Government Bureau

Judith Fabricant, Chief 2068
Peter Sacks, Deputy Chief 2064
William Porter, Affirmative Litigation Coordinator 2062
Edward Rapacki, Appeals Coordinator 2082
John Bowman, Training Coordinator 3311

Administrative Law Division

Judith Yogman, Chief 2066
Jonathan Abbott, Municipal Law Unit 2096
Judy Levenson, Opinions Coordinator 2087

Trial Division

Douglas Wilkins, Chief 3328
William Daggett, Managing Attorney 3327

Environmental Protection Division

Ann Berwick, Chief 3352
William Pardee, Chief Litigation Counsel 3353
Madelyn Morris, Senior Litigation Counsel 3350

Public Protection Bureau

Barbara Anthony, Chief 2925

Criminal Bureau

R. Michael Cassidy, Chief 2810
Mark Smith, Public Integrity Division Chief 2846

Family and Community Crimes Bureau

Diane Juliar, Chief 2878

Business and Labor Protection Bureau

Stuart Rossman, Chief 3232

Western Massachusetts Division (Springfield)

Edward Berlin, Chief ..... (413) 784-1240

RESPONSE SHEET

We hope that you enjoyed this fifth issue of Attorney General Scott Harshbarger's Agency Counsel Newsletter. We have sent one copy to each agency on our mailing list. If your agency has more than one lawyer and would like to receive more than one copy of this and future issues, or if your agency does not yet appear on our mailing list, please fill in this form and return it to AAG Amy Spector, Administrative Law Division, One Ashburton Place, 20th Floor, or telephone us at 727-2200 ext. 2070.

Also, if you have any comments or suggestions for topics to be addressed in future issues, please indicate them below.

Name of Agency:_____

1. Please send our agency ___ additional copies of this and future issues, at the following address:

2. Also, please send copies to the following address(es):

Send ___ copies to:

Send ___ copies to:

3. Comments and suggestions for topics to be addressed in future issues:

Thank you for your cooperation and your ideas.